

**COURT OF APPEALS
DECISION
DATED AND FILED**

NOTICE

September 17, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-0387

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

CITY OF SHEBOYGAN,

PLAINTIFF-RESPONDENT,

v.

JAY A. KRAEMER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Sheboygan County:
JOHN B. MURPHY, Judge. *Affirmed.*

SNYDER, P.J. Jay A. Kraemer appeals from a trial court order entering a default judgment for operating with a prohibited alcohol concentration (PAC). The order was entered after the trial court dismissed the companion charge of operating a motor vehicle while intoxicated. Kraemer argues that the trial court “erred in concluding that [he] defaulted by not entering a plea on the return date, when [he] appeared by phone before the return date, and entered his plea afterwards.” The State argues that the issue raised is “[w]hether the trial

court erred in concluding that Kraemer defaulted by not entering a plea on the return date, when Kraemer purported to appear by a telephone call to the clerk of courts office before the return date, and did not enter a plea until seventy-two (72) days after the date set for arraignment[.]”

We conclude, however, that neither of these statements properly delineates the issue before us. Because Kraemer has not raised this issue before the trial court by way of a § 806.07, STATS., motion (relief from judgment or order), we deem the issue waived. *See Wirth v. Ehly*, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980). Kraemer could have moved the trial court to vacate its order. *See* § 806.07. However, he bypassed the trial court and now seeks appellate review of claims which the trial court should have first examined.

Kraemer has not argued this issue before the trial court, which would have enabled it to exercise its discretion and either grant or deny relief. A decision to vacate a default judgment, like a decision to grant a default judgment, rests within the sound discretion of the trial court. *See Martin v. Griffin*, 117 Wis.2d 438, 442, 344 N.W.2d 206, 209 (Ct. App. 1984). Furthermore, it is well settled that the trial court has broad discretion in deciding whether to reopen a judgment under § 806.07, STATS. *See Johns v. County of Oneida*, 201 Wis.2d 600, 607, 549 N.W.2d 269, 272 (Ct. App. 1996). This court may not exercise the discretion vested in the trial court. *See Preloznik v. City of Madison*, 113 Wis.2d 112, 125, 334 N.W.2d 580, 587 (Ct. App. 1983).

Because we deem the issue of the default judgment waived by Kraemer’s failure to raise it before the trial court, we decline to address the substantive issues of the appeal. *See Olson v. Dunbar*, 149 Wis.2d 213, 218-19,

440 N.W.2d 792, 794 (Ct. App. 1989) (failure to move to reopen default judgment constitutes waiver of issues raised on appeal). The order is affirmed.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

